Filed 11/17/09 In re D.A. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re D.A., et al., Persons Coming Under the Juvenile Court Law.	B215261 (Los Angeles County Super. Ct. No. CK64891)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. A.A., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Margaret Henry, Judge. Affirmed.

Ernesto Paz Rey, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the Los Angeles County Counsel, James M. Owens, Assistant County Counsel and Denise M. Hippach, Associate County Counsel for Plaintiff and Respondent.

Father A.A. appeals from the termination of his parental rights as to four of his eight children who were subjects of this dependency proceeding. He argues the juvenile court erred by failing to comply with Welfare and Institutions Code section 349, subdivision (d)[1] which requires the juvenile court to inquire whether a minor was notified of dependency hearings, wished to be present, and was given an opportunity to attend. While the issue was forfeited by failure to object, we conclude there was no violation in any event because separate counsel for the minor waived his appearance at the relevant hearings. Father also challenges the court's finding that the children were adoptable. We find substantial evidence to support that finding.

FACTUAL AND PROCEDURAL SUMMARY

This dependency proceeding was the subject of a prior unpublished opinion on mother's petition for writ of mandate seeking reversal of an order terminating family reunification services and setting a selection and implementation hearing pursuant to section 366.26. (*M.R. v. Superior Court* (Jan. 23, 2009, B208958).) We take a portion of our factual summary from that opinion.

In September 2006, the Department of Children and Family Services (DCFS) detained seven of mother's eight minor children, placed them in foster care, and filed a petition alleging they came within section 300.[2] Father is the biological father of the eldest seven children, and the presumed father as to all eight. The petition alleged that mother, father, and one of the children had physically abused another child, D.A.2,[3] and

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[1] Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] The whereabouts of the eldest of the minor children, E.A., were unknown at the time detention was ordered. E.A. eventually was located and dependency jurisdiction over her was terminated in May 2007.

[3] Two of the minors share the initials "D.A." In conformity with the policy that the confidentiality of children in dependency be preserved, we refer to the eldest as "D.A.1" and the youngest as "D.A.2."

that E.A.'s whereabouts were unknown, with the family unwilling or unable to account for her. Some of the children denied any abuse of D.A.2. Two police officers informed DCFS that D.A.2 had admitted lying about being burned with a frying pan and that he did so in order to be placed in foster care or adopted. According to family members, D.A.2 had a history of wandering away from home. The children were dirty and neglected. So was the home.

Father claimed mother has mental health issues, hears voices, and has a history of abandoning the children because voices tell her to leave. Between April 2004 and May 2005, the family was under a voluntary family maintenance contract because mother had left and her whereabouts were unknown. An adult son living with the family suffers from schizophrenia. There had been five prior referrals for general neglect, caregiver absence or incapacity, and emotional abuse.

The parties reached an agreement through mediation. The court accepted the mediation agreement and amended the section 300 petition. But on its own motion, the court filed a section 385 motion, then vacated its orders sustaining the petition as amended through mediation. The matter was set for adjudication and a psychological evaluation of both parents pursuant to Evidence Code section 730. In December 2006, psychologist Alfredo E. Crespo reported on his Evidence Code section 730 evaluation of mother and father. He concluded that the imminent return of the minors to the care of either parent should be discouraged, particularly in light of the adult son's schizophrenia. Neither parent appeared to have obvious mental health issues. He suggested that both parents should be enrolled in parenting and anger management classes in addition to couples counseling. Dr. Crespo recommended that the children remain in foster care until it was clear that parents were working through the multiple issues in their relationship.

On January 11, 2007, father submitted on the petition and the court sustained it as pled. All the minors except E.A., who was still missing, were declared dependent children and were ordered detained for suitable placement. Minors D.A.1, R.A., D.A.2, and S.A. were ordered into individual counseling, and minor D.A.1 was ordered to

receive a psychological evaluation. Family reunification services, including individual counseling and a parenting course, were ordered for father. He was ordered to comply with any treatment plan, including medication, recommended by his individual therapist. He was to have unmonitored visits with the children in a neutral setting. The following month, the court ordered referrals to the regional center and mental health services assessments for the three youngest children (A.A., M.A., K.F). At the 12-month review hearing, the court continued reunification services. Minors D.A.1 and R.A. were ordered home to parents in September 2007.

The DCFS report for the 18-month review hearing showed that the five children remaining in foster care (D.A.2, S.A., A.A., M.A., K.F) had progressed. The licensed clinical social worker for D.A.2 wrote to the court in May 2008, warning that visitation between the minor and his biological parents "would be emotionally damaging to [D.A.2] due to the extreme fear and anxiety caused by his negative history with his family of origin." The worker said that D.A.2's high level of fear toward his parents and older brothers apparently stemmed from the physical abuse he experienced when living with them. D.A.2 had expressed very positive feelings about his foster family and wanted to remain with them.

A contested section 366.22 hearing was held in April, May and June 2008. Johnny Carrera, a marriage and family therapist intern, who had provided therapy to mother and D.A.1 for two months, testified. S.S., the caregiver for A.A., M.A. and K.F., testified that she had been caring for the children for over a year (it would be two years in December 2008). She said she wanted to adopt the children with all her heart.

Counsel for D.A.2 argued that his return to parents would be detrimental, citing the therapist's opinion that visitation between him and parents would be potentially damaging in light of the negative family history. D.A.2 did not wish to return to his parents, and had made remarkable progress in his current foster home. Although he suffers from mental and behavioral problems, these issues were being addressed. His attorney argued that it was in his best interests to remain with his foster caregiver.

D.A.1 and R.A. were ordered placed in the home of parents. As to the remaining children, the court found DCFS had made more than reasonable efforts at reunification. The court found continuing jurisdiction was necessary because conditions which justified taking jurisdiction continued to exist. By a preponderance of the evidence, the court found that return of the children to the physical custody of parents would create a substantial risk of detriment to their safety, physical or emotional well-being. It found by clear and convincing evidence that parents had made only partial progress toward alleviating the conditions necessitating placement of the children. Reunification services were terminated. A hearing under section 366.26 to select a permanent plan as to the five younger children was set.

On August 15, 2008, M.A.'s foster mother, Ms. S., told DCFS that during a visit on July 9, 2008, father was appropriate, but M.A. seemed depressed afterward. She told Dr. Zarnegar, the children's therapist, that M.A.'s behavior changed radically after this visit. Dr. Zarnegar recommended that father have no further visits until M.A. was assessed. Based on this recommendation, the juvenile court found father's visits with M.A. detrimental and terminated visitation.

The selection and implementation hearing was repeatedly continued. On November 6, 2008, attorney Schultz (representing the children except D.A.2) informed the court that in a letter, Dr. Zarnegar recommended that A.A.'s visits with father be stopped because they were detrimental. Dr. Zarnegar cited A.A.'s regressive behavior and emotional dysregulation after each visit. She also recommended that father's visits with K.F. be stopped because there was no close relationship between them. The court suspended father's visits with A.A. and K.F. and continued the matter.

The selection and implementation hearing was held February 13, 2009. Father testified that he did not want his parental rights terminated. Both counsel for the children joined in DCFS's recommendation that parental rights be terminated.[4] Counsel for the

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[4] Counsel for S.A., whose status is not contested in this appeal by father, submitted on the evidence.

children except D.A.2 argued there was no colorable exception under section 366.26, subdivision (c)(1)(B) as to A.A., M.A. and K.F.

The trial court recognized that the parents loved their children, but found they did not know how to parent them under the circumstances. It found by clear and convincing evidence that D.A.2, A.A., M.A, and K.F. were adoptable and terminated parental rights over them.

Father filed a timely appeal on April 6, 2009 from the order terminating parental rights.

DISCUSSION

I

Father's first argument is based on section 349. That statute provides that a child who is the subject of a juvenile court hearing has a right to be present at the hearing. As amended in 2008, subdivision (d) provides: "If the minor is 10 years of age or older and he or she is not present at the hearing, the court shall determine whether the minor was properly notified of his or her right to attend the hearing and inquire whether the minor was given an opportunity to attend. If that minor was not properly notified or if he or she wished to be present and was not given an opportunity to be present, the court shall continue the hearing to allow the minor to be present unless the court finds that it is in the best interest of the minor not to continue the hearing. The court shall continue the hearing only for that period of time necessary to provide notice and secure the presence of the child. The court may issue any and all orders reasonably necessary to ensure that the child has an opportunity to attend."

The 2008 legislation included an expression of legislative intent: "'It is the intent of the Legislature that all children who want to attend their juvenile court hearings be given the means and opportunity to attend, that these hearings be set to accommodate children's schedules, and that courtrooms and waiting areas help facilitate their attendance and participation. It is also the intent of the Legislature that juvenile courts promote communication with, and the participation of, children in attendance at hearings

of which they are the subject, and that children attending these hearings leave the hearing with a clear understanding of what decisions the court made and why, and that the Administrative Office of the Courts help promote these objectives.'" (See Historical and Statutory Notes, 73 West's Ann. Welf. & Inst. Code (2009 Supp.) foll. § 349, p. 17.)

Father bases his argument on the court's failure to inquire at the termination hearings as to whether D.A.2 wanted to be present and whether he was given an opportunity to attend. He contends that because section 349, subdivision (d) provides that the juvenile court "shall" conduct this inquiry, failure to satisfy these requirements deprives the court of jurisdiction to proceed. Father acknowledges that counsel for D.A.2 waived his appearance at the section 366.26 hearings scheduled for January 23 and February 13, 2009. But he argues that counsel was not authorized to waive the obligation of the juvenile court to inquire under section 349, subdivision (d).

Analogizing to *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 545, father contends the error was structural and that reversal of the order terminating parental rights is required. In that case, contrary to the express requirement in section 366.21 that a status report be served at least 10 days prior to the hearing date, the report was not served on mother or her counsel until the morning of the hearing. (*Id*. at pp. 540-541.) The *Judith P.* court held that failure to provide timely service of the report constituted structural error and the resulting denial of due process compelled reversal. (*Id*. at pp. 540, 548.)

Respondent asserts that father forfeited this argument by failing to raise an objection on these grounds in the juvenile court. At the hearing on January 23, 2009, the court asked whether the children needed to be present at the continued section 366.26 hearing, which was set for February 13, 2009. Counsel for D.A.2 expressly waived his appearance. Father, who was present, did not object to D.A.2's absence at the hearing.

Respondent relies on *In re S.B.* (2004) 32 Cal.4th 1287, in which the Supreme Court examined the application of forfeiture in dependency proceedings. It held that dependency matters are subject to the general rule that a reviewing court will not consider a challenge to a ruling if an objection could have been made in the trial court, but was

not. (*Id*. at p. 1293.) The court cautioned that application of the forfeiture rule is not automatic, and directed that our discretion to excuse forfeiture "should be exercised rarely and only in cases presenting an important legal issue." (*Ibid.*) The court in *In re S.B.* emphasized that application of the forfeiture doctrine "must be exercised with special care" in dependency matters because the well-being of children is involved. (*Ibid.*)

In re Riva M. (1991) 235 Cal.App.3d 403, cited by respondent as additional support for its forfeiture argument, held that errors in the standard of proof and failure to require expert testimony in an Indian Child Welfare Act case (25 U.S.C. §§ 1901-1963) were forfeited because not raised at trial. In response, father cites *In re S.D.* (2002) 99 Cal.App.4th 1068 for the proposition that the waiver rule will not be enforced if due process forbids it, such as when the error is legal and fundamental. In *S.D.*, an order terminating parental rights was entered, although there was never any evidence supporting dependency jurisdiction. The Court of Appeal agreed with mother that her failure to appeal the jurisdictional order was the result of ineffective assistance of counsel and that the issue was not waived because the waiver rule will not be enforced if due process forbids it. (*In re S. D.*, *supra*, 99 Cal.App.4th at pp. 1071, 1077, 1079-1080.) It held the jurisdictional error was fundamental, and the issue was preserved for appeal. (*Id*. at pp. 1080-1082.)

We agree with respondent that father has failed to preserve the issue for appeal. As in *In re Riva M.*, *supra*, 235 Cal.App.3d at page 412, the requirements of section 349, subdivision (d) are statutory and are not constitutionally compelled. The errors were not fundamental so as to deprive the court of jurisdiction, as was the case in *In re S.D.*, *supra*, 99 Cal.App.4th at pages 1080-1082. The issue is forfeited.

In any event, D.A.2 was separately represented at all hearings. His attorney made it clear that his appearance was waived for the hearings at issue. In light of the

substantial evidence that D.A.2 would be damaged by contact with his parents, the waiver of his appearance was understandable.[5]

II

Father also challenges the juvenile court's findings that D.A.2, A.A., M.A. and K.A. were adoptable.

A. Legal Principles

"On review, we determine whether the record contains substantial evidence from which the juvenile court could find clear and convincing evidence that the child was likely to be adopted within a reasonable time. [Citations.] . . . We give the court's adoptability finding the benefit of every reasonable inference and resolve any evidentiary conflicts in favor of the judgment. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.)" (*In re Valerie W.* (2008) 162 Cal.App.4th 1, 13.)

"The adoptability issue at a section 366.26 hearing focuses on the dependent child, e.g., whether his or her age, physical condition, and emotional state make it difficult to find a person willing to adopt. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649 (*Sarah M.*).) It is not necessary that the child already be in a potential adoptive home or that there be a proposed adoptive parent '"waiting in the wings."' [Citation.] [¶] Conversely, the existence of a prospective adoptive parent, who has expressed interest in adopting a dependent child, constitutes evidence that the child's age, physical condition, mental state, and other relevant factors are not likely to dissuade individuals from adopting the child. In other words, a prospective adoptive parent's willingness to adopt generally indicates the child is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family. (*Sarah M., supra*, 22 Cal.App.4th at pp. 1649-1650.)" (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1311-1312.)

B. D.A.2

Father cites evidence that D.A.2 lied to police in his initial report of physical abuse so he could be adopted or live in foster care. He also relies on evidence of D.A.2's

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[5] We note that the parties have not raised father's standing to claim a violation of D.A.2's rights under section 349, and for that reason, do not discuss the issue.

serious emotional problems which led to a January 2007 hospitalization because he threatened suicide. At that time, D.A.2 was diagnosed with a major depressive disorder. D.A.2's therapist recommended that the child's visits with his parents be suspended after D.A.2's behavior regressed after visits. Despite father's argument that alternatives such as visits in a therapeutic setting were available, the court suspended D.A.2's visits, which father argues eroded the father-son relationship.

Father argues "[t]he recommendations of Dr. Zarnegar and the foster mother's willingness to adopt the children ultimately led the Department and the juvenile court to find [D.A.2], his sisters and brother adoptable. However, given [D.A.2's] mental health and behavior patterns, the foster mother's willingness to adopt [D.A.2] was not sufficient evidence to support a finding of adoptability. (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1205.)"

In re Jerome D., *supra*, 84 Cal.App.4th 1200 is inapposite. In that case, the adoption assessment did not consider the child's close relationship with his mother, his need for continuing care and treatment for his prosthetic eye, or the prospective adoptive father's extensive criminal history which included incidents of domestic violence and emotional abuse of children. (*Id.* at p. 1205.)

Here, in contrast, D.A.2 had been placed with his caregivers, the prospective adoptive parents, for nearly three years when the order finding him adoptable was made. The caregivers were fully aware of his emotional and behavioral issues. The foster mother had been dedicated to ensuring D.A.2 received the services and treatment he required. The child had made significant progress under the care of his foster family. The prospective adoptive parents remained committed to adopting D.A.2, with whom they had formed a strong bond. D.A.2, who was 12 at the time of the hearing, made it clear to DCFS that he feared his biological parents and wanted to be adopted by his foster parents. The foster parents had successfully adopted another child. This is substantial evidence supporting the juvenile court's conclusion that D.A.2 was adoptable.

C. A.A., M.A., K.F.

Father contends that on the recommendation of Dr. Zarnegar, the therapist for D.A.2, A.A., M.A., and K.F., his visits had been terminated because of the behavioral problems the children exhibited after he saw them. He contends that these recommendations constituted an ethical violation, were suspect, and lacked objectivity. He argues that Dr. Zarnegar's reports contained opinions beyond the scope of her practice because father was not included in her treatment plan. As a result, father contends her reports tainted the evidence on which the juvenile court relied concerning the relationships between the children and father. In light of these issues with the reports, father asserts that the findings of adoptability were not supported by substantial evidence.

We disagree. First, as respondent points out, Dr. Zarnegar was the therapist for A.A., M.A., and K.F., but did not treat D.A.2, who had a separate therapist. In addition, Dr. Zarnegar was properly focused on A.A., M.A., and K.F., rather than father. Father does not point to any particular report or passage of a report to support his complaint. Section 366.21, subdivision (h) provides that after termination of reunification services, the court "shall continue to permit the parent . . . to visit the child pending [a section 366.26 hearing] *unless it finds that visitation would be detrimental to the child*." (Italics added.) As respondent points out, we may infer that the juvenile court determined that continued visitation with father would be detrimental to these children when it suspended visitation with the three younger children. This implied finding is supported by substantial evidence through the caregivers' reports of the severe behavioral problems the children experienced after visits. There was substantial evidence that the children were adoptable. Although they had been severely neglected and traumatized, each had flourished in foster care, made progress in treatment and therapy, and had committed caregivers willing to adopt them with full knowledge of their issues.

Father complains that neither counsel for the children nor the court addressed the bond of the children with their other siblings. He acknowledges that counsel for these children joined in the recommendation that parental rights be terminated. Counsel for the children referred to the sibling relationship exception to the preference for adoption

codified in section 366.26, subdivision (c)(1)(B)(v)[6] in argument, saying: "With respect to [A.A., M.A. and K.F.], I don't think there's a colorable . . . (c)(1)(B)(5) . . . exception." We infer that the court considered the section 366.26, subdivision (c)(1)(B)(v) exception.

Counsel for father did not raise the sibling exception in argument at the section 366.26 hearing. Failure to raise the exception forfeits the issue for purposes of appeal. (*In re Daisy D.* (2006) 144 Cal.App.4th 287, 292.)

DISPOSITION

The orders terminating father's parental rights as to D.A.2, A.A., M.A., and K.F. are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P.J.

We concur:

WILLHITE, J. SUZUKAWA, J.

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[6] Section 366.26, subdivision (c)(1)(B)(v) is an exception to termination of parental rights where "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption."